IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
GINA SUE YOST,	2 CA-CV 2006-0041
	DEPARTMENT B
Petitioner/Appellee,	
	MEMORANDUM DECISION
and	Not for Publication
	Rule 28, Rules of Civil
COLTON CILEY YOST,	Appellate Procedure
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. DO2000-25648

Honorable Kirk V. Karman, Judge Pro Tempore

AFFIRMED

Gregan Law Office, P.C.
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Apache Junction
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Colton Yost appeals from the trial court's order denying his petition to modify a prior custody order. That order set forth the respective custody rights of Colton and appellee Gina Yost as to their two children. Colton argues the trial court erred by failing to consider all the evidence and make the requisite findings of fact. For the following reasons, we affirm.

¶2 We state the facts in the light most favorable to sustaining the trial court's judgment. *See Alliance Marana v. Groseclose*, 191 Ariz. 287, 288, 955 P.2d 43, 44 (App. 1997). The parties' marriage was dissolved by decree in October 2000. At that time, the court awarded them joint custody of their two children. In November 2001, Colton petitioned the court to modify parenting time. Gina cross-petitioned the court, requesting sole custody of the children, contending the current situation was causing the children emotional harm.

¶3 In September 2003, Colton and Gina stipulated to a new shared custody arrangement for a six-month trial period and agreed to review the arrangement at the end of the trial period. At the end of the six-month period, Gina petitioned for a change in custody, contending that there had been "substantial and continuing changes in circumstances" since the entry of the stipulated order. Three months later, Colton petitioned for a modification, also contending "substantial and continuing changes in circumstances."

¶4 In an unsigned minute entry order entered after an evidentiary hearing, the trial court refused to modify the custody arrangement. Colton filed a notice of appeal from that

order. Gina argued in her answering brief that this court had no jurisdiction over the appeal because the minute entry was not a final judgment. Shortly thereafter, Colton filed a motion in the trial court for entry of judgment *nunc pro tunc*, which the court denied. We stayed the appeal and revested jurisdiction in the trial court "for the limited purpose of allowing counsel to obtain [a signed, written] order."

¶5 Thereafter, Colton filed a form of order that incorporated the three provisions the court had ordered in its minute entry: that the parties not consume alcohol excessively around the children, that the parties pay their own attorney fees, and that the petition to modify custody be denied. The trial court signed the order on October 5, 2006. That same day, Gina filed her proposed order with the court. That proposed order incorporated extensive findings of fact based on the factors set forth in A.R.S. § 25-403(A). Gina simultaneously objected to Colton's proposed form of order. A few days later, presumably after having received notice that Colton's order had been signed, Gina moved to vacate it, contending its entry violated her right to be heard as to the form of judgment, pursuant to Rule 58(d), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. While the trial court still had jurisdiction, it signed Gina's proposed order. On December 1, we vacated the stay of the appeal, revested jurisdiction in this court, and ordered supplemental briefing to address any new issues raised by the signing of Gina's order. The trial court vacated Colton's order *nunc pro tunc* on December 5.

¶6 In his supplemental brief, Colton argues the trial court erred by entering Gina's detailed proposed custody order because: (1) it was not consistent with the court's original ruling, (2) Gina did not request that the trial court enter findings of fact before trial, and (3) the trial court had adopted Colton's *nunc pro tunc* order first. We review a trial court's denial of a motion to modify custody for an abuse of discretion. *See Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982). We will set aside the court's findings of fact only if "clearly erroneous." *See Wackerman v. Wackerman*, 16 Ariz. App. 382, 386, 493 P.2d 928, 932 (1972).

¶7 Preliminarily, we reject Colton's argument that Gina was not entitled to findings of fact, such as those incorporated in the final order, because she did not request them before the original trial pursuant to Rule 52(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. Section 25-403(B), A.R.S., requires the trial court to make factual findings in any contested custody case regardless of whether counsel requests such findings.

¶8 We are also unpersuaded that Colton's *nunc pro tunc* order supersedes the order proposed by Gina merely because the court entered Colton's first. In entering the first order without allowing Gina an opportunity to object, the trial court violated Rule 58(d). *See Haechler v. Andrews*, 2 Ariz. App. 395, 397, 409 P.2d 315, 317 (1966) (acknowledging court erred by entering judgment without allowing time for objection). On those grounds, Gina appropriately moved the court to vacate the first order. *See* Ariz. R. Civ. P. 59(a)(6), 16 A.R.S., Pt. 2 (permitting trial court to vacate judgment if court made "errors of law"

during progress of action). Although the court did not expressly grant her motion until after jurisdiction had been revested in this court, it implicitly vacated the first order when it signed the second. *See Sanders v. Foley*, 190 Ariz. 182, 185, 945 P.2d 1313, 1315 (App. 1997) (when original judgment awarded attorney fees but did not specify amount, court implicitly vacated it and authorized amended judgment by its minute entry awarding specific amount of fees). Accordingly, we conclude the second order was not nullified by the trial court's earlier, and premature, adoption of Colton's proposed order.

¶9 Lastly, we reject Colton's suggestion that the second order adopted by the court is inconsistent with either its original unsigned minute entry or the evidence presented at the hearing. Colton points to no specific examples of such inconsistencies, instead making only a general claim. And our review of the record reveals no inconsistencies that would render the findings set forth in the second order clearly erroneous.

¶10 For example, the order states the evidence presented by Colton had "failed to prove that [Gina] has any mental health and/or substance abuse issues." Colton introduced some of Gina's medical records that revealed she had sought counseling in June 2002 after a prison riot where she works as a detention officer and that, after a domestic violence incident with her boyfriend in 2003, Gina began seeing a counselor and taking medication for anxiety and depression. But Gina's employer, the Pinal County Sheriff, testified he had no concerns that Gina had substance abuse or mental health problems. He also stated Gina's psychological evaluation had not revealed problems, but rather had shown her to be

a "good candidate" for the detention officer position. Colton also presented evidence, through Child Protective Services (CPS) reports, that the children had told their aunt that Gina had given them alcohol. But CPS was unable to substantiate any of the allegations after an investigation.

¶11 The order states that Colton had reported to CPS and to the police that Gina and her boyfriend had been physically abusing the children but that those allegations had been found unsubstantiated by CPS. This finding too was corroborated by the evidence presented at the hearing.

¶12 In the order, the trial court found "that there has not been any significant domestic violence . . . in either parent's home," and depicts the one incident of violence in August 2003 between Gina and her boyfriend as an isolated event. Again, that conclusion is supported by evidence presented at the hearing: that the children had not been home during the incident involving Gina and her boyfriend, Gina immediately had told Colton about the incident, Gina and her boyfriend had sought counseling, and there had been no further incidents. In short, Gina presented evidence to counter each of Colton's allegations that she was unfit to have custody of the children. And we defer to the trial court's resolution of such conflicts in the evidence. *See Anonymous v. Anonymous*, 23 Ariz. App. 50, 52, 530 P.2d 896, 898 (1975). Accordingly, we conclude the findings of fact were not clearly erroneous.

¶13 Colton argues the trial court abused its discretion when it failed to consider or address the court-appointed custody evaluator's report and recommendations. The court admitted two reports from the custody evaluator into evidence. In the first report from December 2004, the evaluator recommended that the September 2003 stipulated parenting time plan should continue. In the second report from November 2005, the evaluator recommended that Colton be granted sole legal and physical custody of the children. The evaluator based her change of opinion on "the observations of the parents' interactions with the children" and "the individual interviews with the children [that] provided numerous incidents since 2004 to warrant consideration of altering the current parenting time plan."

¶14 We presume the trial court considers all relevant, admissible evidence before issuing a decision. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (trial court presumed to have considered husband's financial situation when husband testified about same and presented documents to court). Other than a general statement that the court failed to consider the recommendations of the second report, Colton has not provided any explanation to rebut the presumption that the court considered the report. Rather, the thrust of his argument is that the trial court erred by failing to adopt the recommendations of the evaluator. Although a trial court "may seek the advice of professional personnel" when deciding child custody, A.R.S. § 25-405(B), nothing in the child custody statutes requires the court to adopt the professional's advice. To the contrary, § 25-403(A) provides that "[t]he *court* shall determine custody." (Emphasis added.)

Indeed, this court held in *DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995), that the trial court had erred by deferring to an expert's recommendations without exercising its independent judgment. Therein, we stated, "The best interests of the child . . . are for the court alone to decide."[1] We find no abuse of discretion.

¶15 Lastly, Colton argues the trial court abused its discretion when it failed to consider any of the testimony or evidence presented at the hearing, based on the court's comment at the hearing, "I already think I know what my ruling is going to be." But the statement cannot be considered in isolation. The court made the statement in the context of discussing an objection Gina's counsel had made during Colton's cross-examination of Gina. In response, the court stated,

> Let's see if she can answer your question. You guys are taking more time than the answer would. We are not going to get anywhere if we keep having it this way.
>
> You're right. I'm letting a lot of answers stand. I have been doing this 22 years. I have heard a ton of stuff. I think I know what to sift in and out of.

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[1]The trial court heard evidence that would have entitled it to reject the evaluator's recommendation. Gina testified the evaluator had not taken into account all Gina's concerns about Colton's parenting in the updated report. Nor had the evaluator ever talked to Gina in detail about any of her concerns. And the report did not include some of the specific information the children had given the evaluator, upon which she had partially based her recommendation Colton be awarded sole custody. Gina also testified she did not agree with several of the evaluator's impressions of how she interacts with her children, and the evaluator had observed Gina with her children just once for fifteen minutes. Gina's testimony and the contradictory recommendation in the evaluator's first report created a conflict in the evidence, which the trial court had the duty to resolve. *See Anonymous v. Anonymous*, 23 Ariz. App. 50, 52, 530 P.2d 896, 898 (1975).

> Let's get this done. I already think I know what my ruling is going to be, to be quite frank with you folks, but let's get this done so that we can hear the rest and perhaps change my mind.

Here, the court's final statement that it would hear the rest of the evidence and possibly change its mind demonstrates that it intended to consider the rest of the evidence before making a final decision. And, the court's signed order states that it had considered the testimony and evidence presented at the hearing and reviewed the file in its entirety before ruling. Therefore, the trial court's remarks do not rebut the presumption that the trial court considered all the evidence before rendering its decision.[2]

¶16 Gina requests her attorney fees incurred on appeal pursuant to Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., contending Colton's appeal was untimely and frivolous. While we have found Colton's appeal to be without merit, we do not find it was frivolous. *See Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988) ("The line between an appeal which has no merit and one which is frivolous is very fine, and we

[2]We need not address Colton's contention the trial court erred by failing to enter specific factual findings about the best interests of the children under A.R.S. § 25-403. Colton did not object to the lack of findings. Rather, he filed his notice of appeal days after the court issued its unsigned minute entry, without giving the court the opportunity to correct the deficiency. Therefore, even if the court had failed to set forth any findings, a questionable conclusion in light of the detailed findings of fact in the second order, Colton has not preserved for appeal any argument that the failure was error. *See Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) (finding in appeal from award of attorney fees where findings of fact are required by statute, "the failure of a party to object to the lack of findings of fact and conclusions of law . . . precludes that party from raising the absence of findings as error on appeal").

exercise our power to punish sparingly."). Accordingly, we decline to award attorney fees on this basis.

¶17 Finding no error, we affirm the trial court's order signed November 21, 2006.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge